

ROBERT E. FREITAS (SBN 80948)
rfreitas@fawlaw.com
JESSICA N. LEAL (SBN 267232)
jleal@fawlaw.com
FREITAS & WEINBERG LLP
350 Marine Parkway, Suite 200
Redwood Shores, California 94065
Telephone: (650) 593-6300
Facsimile: (650) 593-6301

Attorneys for Counterdefendant
Surbhi Sarna

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BOSTON SCIENTIFIC CORPORATION,
BOSTON SCIENTIFIC SCIMED, INC.
AND FORTIS ADVISORS LLC,

Plaintiffs,

v.

BIOCARDIA, INC.,

Defendant.

BIOCARDIA, INC.,

Counterclaimant,

v.

BOSTON SCIENTIFIC CORPORATION,
BOSTON SCIENTIFIC SCIMED, INC.
FORTIS ADVISORS LLC, AND SURBHI
SARNA,

Counterdefendants.

No. 3:19-cv-05645-VC

(Related Case No. 3:20-cv-02829-VC)

REQUEST FOR JUDICIAL NOTICE

Date: December 3, 2020

Time: 10:00 a.m.

Ctrm: 3, 17th Floor

Judge: Hon. Vince Chhabria

TO THE COURT, ALL PARTIES AND COUNSEL OF RECORD:

Pursuant to Federal Rule of Evidence 201 and relevant case law regarding judicial notice, it is hereby requested the Court to take judicial notice of the following facts:

CareDx, Inc.

1. On December 21, 1998, a Certificate of Incorporation of Hippocratic Engineering, Inc. was filed with the Secretary of State for the State of Delaware. (Ex. C at 000208.)

2. On April 23, 1999, a Certificate of Amendment to the Amended and Restated Certificate of Incorporation of Hippocratic Engineering, Inc. was filed with the Secretary of State for the State of Delaware setting forth the following amendment: “The name of the corporation is BioCardia, Inc.” (Ex. C at 000224.)

3. On June 18, 2002, an Amended and Restated Certificate of Incorporation of BioCardia, Inc. was filed with the Secretary of State for the State of Delaware setting forth the following amendment: “The name of the corporation is Expression Diagnostics, Inc.” (Ex. C at 000241.)

4. On August 30, 2007, a Certificate of Amendment of Amended and Restated Certificate of Incorporation of Expression Diagnostics, Inc. was filed with the Secretary of State for the State of Delaware setting forth the following amendment: “The name of the corporation is XDx, Inc.” (Ex. C at 000357.)

5. On March 24, 2014, a Certificate of Amendment of the Certificate of Incorporation of XDx, Inc. was filed with the Secretary of State for the State of Delaware setting forth the following amendment: “The name of the Corporation shall be CareDx, Inc.” (Ex. C at 000422.)

6. CareDx, Inc. is an active Delaware corporation. (Ex. F.)

BioCardia Lifesciences, Inc.

7. On March 1, 2002, a Certificate of Incorporation of BioCardia DeviceCo, Inc.

was filed with the Secretary of State for the State of Delaware. (Ex. B at 000059.)

8. On August 9, 2002, a Certificate of Amendment of the Certificate of Incorporation of BioCardia DeviceCo, Inc. was filed with the Secretary of state for the State of Delaware setting forth the following amendment: “The name of the corporation is ‘BioCardia, Inc.’” (Ex. B at 000074.)

9. On October 24, 2016, a Certificate of Merger of Icicle Acquisition Corp. With And Into BioCardia, Inc. was filed with the Secretary of State for the State of Delaware setting forth that the surviving corporation of the merger is BioCardia, Inc. and the Certificate of Incorporation of the surviving corporation shall be amended and restated as follows: “The name of this corporation shall be BioCardia Lifesciences, Inc.” (Ex. B at 000203, 000206.)

10. BioCardia Lifesciences, Inc. is an active Delaware corporation. (Ex. G.)

BioCardia, Inc.

11. On January 12, 1994, a Certificate of Incorporation of NAM Corporation was filed with the Secretary of State for the State of Delaware. (Ex. A at 000001.)

12. On June 15, 2000, a Certificate of Amendment of Certificate of Incorporation of NAM Corporation was filed with the Secretary of State for the State of Delaware setting forth the following amendment: “The name of the Corporation is clickNsettle.com, Inc.” (Ex. A at 000029.)

13. On October 22, 2008, a Certificate of Amendment of Amended and Restated Certificate of Incorporation of clickNsettle.com, Inc. was filed with the Secretary of State for the State of Delaware setting forth the following amendment: “The name of the corporation is Cardo Medical, Inc.” (Ex. A at 000041.)

14. On June 10, 2011, a Certificate of Amendment to Amended and Restated Certificate of Incorporation of Cardo Medical, Inc. was filed with the Secretary of State for the State of Delaware setting forth the following amendment: “The name of the corporation is Tiger X Medical, Inc.” (Ex. A at 000042.)

15. On October 24, 2016, a Certificate of Amendment to Amended and Restated Certificate of Incorporation of Tiger X Medical, Inc. was filed with the Secretary of State for the State of Delaware setting forth the following amendment: “The name of the Corporation is BioCardia, Inc.” This amendment was stated to be effective as of 1:00 am Eastern Time on October 26, 2016. (Ex. A at 000044.)

16. The most recent Form 10-Q filed by BioCardia, Inc. with the United States Securities and Exchange Commission (“SEC”) identifies BioCardia Lifesciences, Inc. as a wholly owned subsidiary of BioCardia, Inc. (Ex. I, pg. 12 under (8) Note payable under Paycheck Protection Program.)

Peter Altman

17. Dr. Peter Altman’s “BioCardia, Inc. Employment, Confidential Information and Invention Assignment Agreement” is dated July 17, 1999. (Ex. D.)

Simon Stertzer

18. Dr. Simon Stertzer’s “Agreement for Scientific Advisor Services” with Hippocratic Engineering states it was made effective December 4, 1998. (Ex. E.)

DOCUMENTS

19. The Secretary of State for the State of Delaware records for the corporation “BioCardia, Inc.” [**Exhibit A** to the concurrently filed Declaration of Jessica N. Leal (“Leal Decl.”)]

20. The Secretary of State for the State of Delaware records for the corporation “BioCardia Lifesciences, Inc.” [**Exhibit B** to the Leal Decl.]

21. The Secretary of State for the State of Delaware records for the corporation “CareDx, Inc.” [**Exhibit C** to the Leal Decl.]

22. Peter Altman's July 1999 employment agreement referenced in paragraphs 108 and 109 of BioCardia's counterclaim that was produced by the counterclaimant BioCardia, Inc. with Bates Nos. BC-BSC_0016550-16560 [**Exhibit D** to the Leal Decl.]

23. Simon Stertzner's "Agreement for Scientific Advisor Services" referenced in paragraph 107 of BioCardia's counterclaim that was produced by the counterclaimant BioCardia, Inc. with Bates Nos. BC-BSC_0015656-15661 [**Exhibit E** to the Leal Decl.]

24. CareDx, Inc.'s status with the State of Delaware [**Exhibit F** to the Leal Decl.]

25. BioCardia Lifesciences, Inc.'s status with the State of Delaware [**Exhibit G** to the Leal Decl.]

26. The Agreement and Plan of Merger by and among Tiger X Medical, Inc., BioCardia, Inc., Icicle Acquisition Corp., and Jay Moyes, as the Company Representative and Steven Rubin, as the Parent Representative, dated as of August 22, 2016 [**Exhibit H** to the Leal Decl.]

27. BioCardia, Inc.'s August 13, 2020 Form 10-Q filing with the United States Securities and Exchange Commission [**Exhibit I** to the Leal Decl.]

28. BioCardia, Inc.'s April 9, 2020 Form 10-K filing with the United States Securities and Exchange Commission [**Exhibit J** to the Leal Decl.]

29. U.S. Patent Application No. 11/016,448, filed December 17, 2004, published on June 22, 2006 as US 2006/0135961 [**Exhibit K** to the Leal Decl.]

30. U.S. Patent Application No. 11/295,412, filed December 6, 2005, published on April 20, 2006 as US 2006/0084943 [**Exhibit L** to the Leal Decl.]

31. U.S. Patent Application No. 12/177,338, filed July 22, 2008, published on November 20, 2008 as US 2008/0287918 [**Exhibit M** to the Leal Decl.]

32. U.S. Patent No. 9,173,571 (issued November 3, 2015) [**Exhibit N** to the Leal Decl.]

33. U.S. Patent No. 10,610,149 (issued April 7, 2020) [**Exhibit O** to the Leal Decl.]

34. U.S. Patent No. 10,639,016 (issued May 5, 2020) [**Exhibit P** to the Leal Decl.]

35. U.S. Patent No. 10,646,209 (issued May 12, 2020) [**Exhibit Q** to the Leal Decl.]

36. The March 2010 published article “The Origin and Pathogenesis of Epithelial Ovarian Cancer: A Proposed Unifying Theory” by Robert J. Kurman, MD and Ie-Ming Shih, MD, PhD [**Exhibit R** to the Leal Decl.]

According to Federal Rule of Evidence 201, a court “may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). A court “must take judicial notice if a party requests it and the court is supplied with the necessary information.” Fed. R. Evid. 201(c).

The above facts and attached records are a proper subject of judicial notice. *See, e.g., Saponjic v. BMW of N. Am., LLC*, Case No. 20-cv-703-BAS, 2020 U.S. Dist. LEXIS 125425, *4-5 (S.D. Cal. July 15, 2020); *Certain Underwriters at Lloyds v. Kleinberg & Lerner*, Case No. 19-cv-10143-PSG, 2020 U.S. Dist. LEXIS 123168, *10-11 (C.D. Cal. April 3, 2020); *Skogebo v. Cofiroute United States, LLC*, Case No. 19-cv-00739-AG, 2019 U.S. Dist. LEXIS 215648, *2-3, 2019 WL 6711701 (C.D. Cal. October 24, 2019); *Alabsi v. Savoya, LLC*, Case No. 18-cv-06510-KAW, 2019 U.S. Dist. LEXIS 49675, *12, 2019 WL 1332191 (N.D. Cal. March 25, 2019); *Davis v. Cavy*, Case No. 17-cv-7324-RSWL, 2017 U.S. Dist. LEXIS 168391, *1 (C.D. Cal. October 10, 2017); *Boeing Co. v. KB Yuzhnoye*, Case No. CV 13-00730-AB, 2016 U.S. Dist. LEXIS 63630, *39 (C.D. Cal. May 13, 2016); *Koop v. AMCO Ins. Co.*, Case No. 16-cv-01963-LB, 2016 U.S. Dist. LEXIS 83258, *6 (N.D. Cal. June 27, 2016); *Cummings v. Koninklijke Philips Elecs.*, Case No. C 02-2121SI, 2002 U.S. Dist. LEXIS 23383, *11 (N.D. Cal. Nov. 25, 2002); *Mullin v. Wells Fargo Bank, N.A. (In re Mullin)*, 2014 Bankr. LEXIS 4715, *6 (9th Cir. 2014); *Hogan v. NW Trust Servs.*, Case No. 10-6028-HO, 2010 U.S. Dist. LEXIS 45612, *9, 2010 WL 1872945 (D. Or. May 6, 2010); *Soto v. Diakon Logistics (Delaware), Inc.*, Case No. 08-cv-33-L, 2009 U.S. Dist. LEXIS 20541, *7, 2009 WL 690178 (S.D. Cal. March 13, 2009).

The court may also take judicial notice of “documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading.” *See Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). *See also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (the court may consider documents incorporated into the complaint by reference and matters of which a court may take judicial notice).

Dated: September 24, 2020

ROBERT E. FREITAS
JESSICA N. LEAL
FREITAS & WEINBERG LLP

/s/Jessica N. Leal
Jessica N. Leal
Attorneys for Counterdefendant
Surbhi Sarna